Supreme Court, U.S.
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IN THE

Supreme Court of the United States

1971 -October Term

No. 71-8971

NEW YORK DISTRICT COUNCIL NO. 9,
INTERNATIONAL BROTHERHOOD OF
PAINTERS & ALLIED TRADES, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

NEW YORK DISTRICT COUNCIL NO. 9, INTERNATIONAL HOOD OF PAINTERS & ALLIED TRADES, AFL-CIO,
Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the above, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner above named, (formerly known as New York District Council No. 9, Brotherhood of Painters, Decorators & Paperhangers of America, AFL-CIO), prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered on the 13th day of October, 1971, in the above case, *sub nom National Labor Relations Board v. New York District Council No. 9, Brotherhood of Painters, Decorators & Paperhangers of America, AFL-CIO.*

Citation of Opinions Below

The Court of Appeals for the Second Circuit issued its decision from the bench, without opinion; its judgment centered thereon is printed herein as Appendix A.

The decision and order of the National Labor Relations Board found that Petitioner had committed an unfair labor practice in violation of Section 8(b)(4)(ii)B of the National Labor Relations Act, as amended [29 U.S.C. sec. 158(8)(4)(ii)B]. Such decision and order is reported in 185 N.L.R.B. No. 33, and is printed as Appendix B hereto.

Th Trial Examiner's decision upon which the National Labor Relations Board decision and order were based is unreported and is printed as Appendix C hereto.

Jurisdiction

The judgment sought to be reviewed is that of the Court of Appeals for the Second Circuit entered on October 13, 1971. No petition for a rehearing was filed.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented for Review

The basic question presented for review is whether a labor union's rights under the First Amendment to the Constitution have been violated by a National Labor Relations Board finding that such union's appeals to a governmental agency for redress of grievances, made by means of written and oral communications, constituted an unfair labor practice in that they threatened, coerced or restrained such governmental agency within the meaning of section 8(b)(4)(ii)B of the National Labor Relations Act.

Statute Involved

Section 8(b)(4)(ii)B of the National Labor Relations Act, as amended (29 U.S.C. Section 158(b)(4)(ii)B), reads, in pertinent part, as follows:

> "It shall be an unfair labor practice for a labor organization or its agents——
>
> * * * * *
>
> (4) * * *
>
> (ii) To threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where an object thereof is:
>
> * * * * * *
>
> (B) forcing or requiring any person * * * to cease doing business with any other person, * * *: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . ."

Statement of the Case

A. The Facts

Petitioner (the "Union"), a labor organization, had entered into a collective bargaining agreement with Delta Contracting Corp. ("Delta"), requiring, among other things, the payment by Delta of certain wage supplements for pension, welfare and insurance purposes for the benefit of Delta's employees. A dispute arose between the Union and Delta about the Union's claim for $26,000 in unpaid wage supplements, causing the Union to declare Delta unfair (TXD 247 n. 4)[1] and to withdraw the Union's members

[1] Numerical references herein preceded by "TXD" are to the pages of the Trial Examiner's Decision contained in Appendix C herein.

from Delta's work. In order to execute a contract which Delta had entered into with the New York City Board of Education, an agency of the City of New York (TXD 244, for painting and modernization work in Public School 228, Delta subcontracted its work to Strip Clean Floor Refinishing Corp. ("Strip Clean"), conceded in the National Labor Relations Board proceeding to have been Delta's ally [see *Douds* v. *Metropolitan Federation of Architects* (*Ebasco*), 75 F. Supp. 672 (S.D.N.Y. 1948)] TXD 267, n. 19).

The Board of Education contract required, among other things, that Delta comply with the requirements of Section 220 of the New York State Labor Law by paying to its employees the prevailing rates of wages and wage supplements (TXD 247, n. 5). The contract also provided that "The Board [of Education] shall have the right to declare [Delta] in default . . . if at any time the [Executive Director of the Office of School Buildings] is of the opinion and shall so certify to the Board [of Education] that [Delta] is or has been wilfully or in bad faith violating any of the provisions of the contract" (TXD 248, n. 5).

During the Summer of 1969 petitioner-Union sent various written communications to the Board of Education informing it of the dispute and of the fact that the Union intended to picket Delta and Strip Clean at the P.S. 228 job site. These written communications charged Delta with violating its collective bargaining agreement with the Union and its contract with the Board of Education. The communications requested the Board to hold an immediate hearing pursuant to the terms of its contract with Delta with a view toward cancellation of the Board's contract with Delta (see, e.g., TXD 255, 256, 258). In one of these communications, a letter dated July 29, 1969, to Mr. Richard J. Martin, Director of the Division of Maintenance and Operations of the Office of School Maintenance, the Union stated: "The charges we have made are serious.

Because we are mindful of serving the best interests of the schools as public spirited citizens, we must insist that such gross and repeated violations, involving large sums of money, should not be ignored. We want to avoid any scandals involving execution of painting contracts, both from the point of view of our Union as well as the Board of Education and the City of New York" (TXD 259).

On September 1, 1969, the Union began picketing Delta in front of P.S. 228 with signs stating that Delta was unfair "for underpayment to insurance and pension funds," and it continued to picket until October 10, 1969 (TXD 251). Meanwhile, Strip Clean had filed charges with the National Labor Relations Board on August 15, 1969, that the Union had violated Sections 8(b)(4)(i) and (ii)B of the National Labor Relations Act. On October 17, 1969, the Board issued a complaint based on the filed charges and on the subsequent picketing, and a hearing was held before a Trial Examiner on December 1 and 2, 1969.

The Trial Examiner concluded, after the hearing, that there was no evidence that the Union had induced or encouraged Board of Education employees to engage in a work stoppage and therefore that the charge with respect to Section 8(b)(4)(i)B had not been sustained (TXD 272-273).[2] There was no evidence that the picketing had

[2] Section 8(b)(4)(i)B reads in pertinent part as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

4(i) to engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal . . . to perform any services . . . where . . . an object thereof is:

* * * * *

(B) forcing or requiring any person . . . to cease doing business with any other per-

impeded Strip Clean in its work or caused disruption or harm in any way to P.S. 228 or the Board of Education (See TXD 264). Nevertheless, although it was conceded by the National Labor Relations Board that the picketing was in substantial literal compliance with the *Moore Dry Dock* standards (TXD 270)[2] and that Strip Clean was the ally of Delta with whom the Union had a primary dispute (TXD 267, n. 19), he concluded that the Union's communications which preceded the picketing had coerced and restrained the Board of Education with the object of causing the Board of Education to cancel its contract with Delta and cease doing business with Delta.

On August 27, 1970 the National Labor Relations Board, in a split decision, affirmed the Trial Examiner's ruling, a dissenting member of the Board indicating in a separate opinion his disagreement with the majority's finding of a violation by the Union.

On October 13, 1971, the Court of Appeals for the Second Circuit issued an order enforcing the Board's decision.

B. Reasons for Granting the Writ

The important question of constitutional law presented here has never been decided but has been recognized and adverted to by the Court of Appeals, First Circuit, in *National Labor Relations Board* v. *Local* 254, *Building*

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son . . . *Provided*, that no thing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . ."

[2] The Moore Dry Dock standards were established by decision of the National Labor Relations Board in *Sailors' Union of the Pacific* (*Moore Dry Dock*), 92 NLRB 547, and are discussed in *Local* 761, *IUE* v. *N.L.R.B.* (*General Electric*), 366 U.S. 667, 673, 677-681 (1961).

Service Employees International Union, 376 F. 2d 131 (1967). In that case, the Union had picketed the Massachusetts Department of Education in an attempt to prevent the award of a contract to an employer with whom the Union had a dispute. The National Labor Relations Board asked the Court to find that the picketing was in violation of a previous court order issued pursuant to Section 8(b)(4)(ii)B of the Act. The Court refused to so find, saying at page 135:

> "In the first place, the words 'threaten, coerce or restrain' have apparently never been defined where the object is a public agency. The Department of Education has no customers. The appeal might be found to have been only to officials of the Department and the general public. . . . The farther that picketing recedes from 'isolated evils' and the closer it comes to the guarantees of the First Amendment . . . the more cautious we must be."

The First Circuit did not, however, decide this issue, nor was it required to do so in that case, so that the question still remains without a definitive answer. The present case is a direct presentation of that issue.

It is petitioner's position on this application that its communications constituted petitions to a government agency for a redress of grievances. They protested the failure of the Board of Education to take the steps provided in its contract with Delta with respect to Delta's violations of that contract. Moreover, they protested Delta's violations of the prevailing wage requirements not only as contained in that contract, but as provided for in Section 220 of the New York State Labor Law.

The Union's protests to the Board of Education were made in an orderly and peaceful manner. The Trial Examiner found that at least one of the written communications was sent at the express request of the Board of Edu-

cation (TXD 254). He further found that the Board of Education had made it known to unions engaged in work on its locations that it wished to be kept advised of any picketing that might occur at its schools and it made a practice of requesting the union to notify it by letter in such a case (TXD 250). The Union contended that its communications were made pursuant to this practice.

This Court has repeatedly recognized that the constitutional right of petition may not be infringed upon in the carrying out of laws which are otherwise properly enforceable. It said in *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217 (1967), at page 222:

> "We start with the premise that the right to assemble peaceably and to petition for a redress of grievances are among the most precious liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and purpose, with the other First Amendment rights of free speech and free press. All these, though not identical, are inseparable [omitting citations]. The First Amendment would, however, be a hollow promise if it left Government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence or even because the laws do in fact provide a helpful means of dealing with such an evil."

Petitioner-Union does not claim or suggest that the secondary boycott provisions of the National Labor Relations Act are wholly unconstitutional, but it does contend

that under the facts of this case the Union's conduct with respect to the New York City Board of Education was a proper exercise of its constitutional rights. That the Union combined its speech with the action of picketing should not be fatal to petitioner's contentions because the picketing itself was not held to constitute a violation of the applicable statute and, furthermore, this silent, peaceful, orderly picketing was in furtherance of the Union's First Amendment rights. As this Court stated in *Brown* v. *Louisiana*, 383 U.S. 131 (1966) at 142,

> "They [the First Amendment rights] embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful pressure, in a place where the protestant has every right to be. . . ."

Even the clear and present danger doctrine would not justify infringement of the Union's First Amendment rights in this case. That doctrine was defined by this Court in *Bridges* v. *California*, 314 U.S. 252 (1941) at 263, as follows:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterance can be punished. These cases do not purport to mark the furthermost constitutional boundaries of protected expression nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging freedom of speech or of the press.' It must be taken as a command of the broadest scope that the implicit language read in the context of a liberty-loving society will allow."

In this case there is no evidence in the record that the Board of Education was harmed in any way by the Union's conduct. Furthermore, there is no evidence that the complainant, Strip Clean, was harmed either. This is not a case where the written or spoken words were incidental to some prohibited conduct. Cf. *Green* v. *International Typographical Union,* 182 F. Supp. 788 (1960). However, this is a case where the Union's First Amendment rights collide with the interpretation of the statute in this particular case. In this type of collision, the Courts have recognized the primacy of the First Amendment principles. *National Labor Relations Board* v. *Fruit and Vegetable Packers,* 377 U.S. 58 (1964).

Therefore, because this case represents a possible conflict of Circuits, and because this case involves a substantial question of constitutional law, the petitioner requests this Court to grant this petition.

CONCLUSION

For the stated reasons, this petition for a Writ of Certiorari should be granted.

January 10, 1972

Respectfully submitted,

IRWIN M. ECHTMAN
Counsel for Petitioner

HENRY J. EASTON
STEPHEN SCHLAKMAN
Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No.
	)	71-1147
NEW YORK DISTRICT COUNCIL NO. 9 BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO,	)	
	)	
Respondent.	)	

J U D G M E N T

Before: MANSFIELD, LUMBARD and OAKES, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, New York District Council No. 9, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, its officers, agents,

APPENDIX A

and representatives on August 27, 1970. The Court heard argument of respective counsel on September 28, 1971, and at the conclusion of oral argument handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Second Circuit that the said Order of the National Labor Relations Board in said proceedings be enforced, and that New York District Council No. 9 Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, its officers, agents, and representatives, abide by and perform the directions of the Board in said Order contained.

APPENDIX A

IT IS FURTHER ORDERED that costs shall be taxed against the Respondent.

(signed) J. Edward Lumbard
Judge, United States Court of Appeals for the Second Circuit

(signed) Walter R. Mansfield
Judge, United States Court of Appeals for the Second Circuit

FILED:

October 13, 1971

APPENDIX B

DECISION AND ORDER

On March 26, 1979, Trial Examiner Harry H. Kuskin issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain of the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent had not engaged in certain other alleged unfair labor practices and recommended that the complaint be dismissed in that regard. Thereafter, Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and supporting briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that Respondent, New York District Council No. 9 Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. August 27, 1970

Edward B. Miller, Chairman

Frank W. McCulloch, Member

Howard Jenkins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Member Brown, dissenting:

In furtherance of a primary labor dispute with Delta, Respondent Union threatened to, and did, picket Delta's operations at the Board of Education (BOE) project. This picketing complied in all respects with the criteria for presumptively lawful picketing set forth in Moore Dry Dock.[1/]

1/ Sailors' Union of the Pacific (Moore Dry Dock), 92 NLRB 547, discussed in Local 761, IUE v. N. L. R. B. (General Electric), 366 U. S. 667, 673, 677-681.

Whatever effects there may have been on BOE, a neutral in the dispute, were incidental to Respondent Union's lawful picketing activities. [2] That Respondent Union communicated with BOE in an effort to avoid taking picketing action against Delta was hardly sufficient, in my judgment, to convert Respondent's lawful picketing into unlawful secondary conduct. [3] At no time during such conversations did Respondent threaten, or even suggest, that it would picket either BOE or the latters employees.

Dated, Washington, D. C. August 27, 1970.

Gerald A. Brown, Member
NATIONAL LABOR RELATIONS BOARD

2/ Local 761, IUE v. N. L. R. B. (General Electric), 366 U.S. 667, 672-674.

3/ Retail Clerks Union, Local 770 v. N. L. R. B. (Food Employer's Council, Inc.), 296 F. 2d 368, 373; Plumbers and Pipefitters Local 471 (Wyckoff Plumbing), 135 NLRB 329, 331-332; Truck Drivers & Helpers Local No. 592, Teamsters (Estes Express Lines, Inc.), 181 NLRB No. 121.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON D. C.

NEW YORK DISTRICT COUNCIL NO. 9
BROTHERHOOD OF PAINTERS, DECORATORS
AND PAPERHANGERS OF AMERICA AFL CIO

and

STRIP CLEAN FLOOR REFINISHING &
PAINTING CORP.

David Lew, Esq., for
the General Counsel
Sanford E Pollack, Esq.,
for the Charging Party.
Henry J. Easton, Esq.,
of Easton & Echtman,
for Respondent.

TRIAL EXAMINER S DECISION

Statement of the Case

HARRY H. KUSKIN, Trial Examiner: This proceeding was heard at Brooklyn, New York, on December 1 and 2, 1969. A complaint, as amended at the hearing, issued herein on October 17, 1969, based on a charge filed by Strip Clean Floor Reginishing & Painting Corp., herein called Strip Clean, on August 15, 1969, in which it is alleged that New York District Council No. 9 Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, herein called Respondent, has, by certain described conduct, violated Section 8(b)(4)(i) and (ii)(B) of the Act by threatening the Board of Education of the City of New York, herein called the Board of Education, orally and in written communications, with picketing and with other

economic reprisals if Strip Clean and Delta Contracting Corporation, herein called Delta, were permitted to continue working at Public School 228, located in Brooklyn, New York, herein called P.S. 228, and by thereafter, in furtherance of its labor dispute with Delta, engaging in picketing at P.S. 228 and causing employees of the Board of Education and of other persons engaged in commerce to strike and refuse to perform services for their respective employers, all with an object of forcing and requiring the Board of Education to cease doing business with Delta and of forcing or requiring other persons normally doing business with the Board of Education to cease doing business with the Board of Education. In its answer, as amended at the hearing, Respondent denies that it has engaged in any of the unfair labor practices alleged herein.

Upon the entire record, [1] including my observation of the witnesses, including their demeanor while on the witness stand, and after due consideration of the briefs of the General Counsel and Respondent, I make the following:

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[1] Respondent filed a motion herein to correct the transcript of these proceedings. The General Counsel filed a reply thereto and a cross motion to further correct the transcript. Thereafter the General Counsel filed an errata relating to the aforesaid reply and cross motion, as well as additions to his cross motion to further correct the transcript. Counsel for Respondent, in turn, filed his own affidavit in which he opposes, in certain instances, the General Counsel's cross motion to further correct the transcript, basing such opposition on the transcript itself and on his recollection of the testimony. Upon consideration of all the foregoing, I shall grant the motion of Respondent and the cross motion of the General Counsel, as supplemented, with respect to all proposed corrections which are not contested herein. As to those corrections proposed by Respondent which are contested by the General Counsel, I shall grant those proposed by

Findings of Fact

I. The Business of the Board of Education

The complaint, as amended, alleges, and Respondent admits, that the Board of Education is an agency of the City of New York operating the public system of the City of New York; and that, during the past year, which period is representative of its annual operations generally, it purchased and caused to be delivered to its New York City places of business directly from states outside the State of New York various materials, the value of which exceeded $50,000.

The complaint, as amended, alleges further and Respondent admits that, at all times material herein, (1) Strip Clean has been a New York corporation and has maintained its principal office and place of business in the Bronx, New York, where it is engaged in residential and commercial painting contracting and related services; and (2) Delta has similarly been a New York corporation with its principal office and place of business

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1/ (Continued) Respondent on page 13 line 19 and on page 428 line 5; however, I shall deny those proposed by Respondent on page 18 line 16, page 19 line 24, page 343 line 1, and page 353 lines 21 and 22, and shall, instead, grant the corrections at these respective places proposed by the General Counsel. In addition, I shall deny those proposed corrections appearing in the General Counsel's cross motion which are objected to by Respondent, namely, those on page 144 line 11, page 148 line 16, page 158 line 11, page 158 line 20, page 294 line 15, page 310 line 4, and page 311 line 4. While I note that there are in the above motions a considerable number of imprecise designations of the lines on the given pages on which corrections are sought, I have not specifically corrected these imprecise designations because, in all instances, the line mentioned should either bear the number immediately preceding or immediately following the one mentioned, and the references are readily recognizable.

in the Bronx, New York, where it is engaged in commercial painting contracting and related services, and, further, Delta has contracted with the Board of Education to perform certain services at P.S. 228, and has, in turn, subcontracted some of this work to Strip Clean.

I find upon the basis of the foregoing, and as Respondent also admits, that the Board of Education is a person engaged in an industry affecting commerce. I also find that the purchases of the Board of Education which are affected by the dispute have a substantial impact upon the shipment of goods and supplies in interstate commerce and upon industries affecting commerce within the meaning of Section 8(b)(4) and Section 2(6) and (7) and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

I find also, and Respondent does not deny, that, as alleged, New York District Council No. 9 Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. Some background facts

In 1964, at the time Delta began to do business, it entered into a contractual relationship with Respondent.

1/ (Continued) In addition to all the foregoing corrections, the transcript is inaccurate in various respects relating primarily to comments by the undersigned, and it is hereby further corrected in the manner indicated in Appendix "B," attached hereto.

Thereafter, in 1965, Delta agreed with Respondent to be bound, for the period of August 1, 1965 to July 31, 1968, by a contract between Respondent and the Association of Master Painters and Decorators of the City of New York, Inc. [2] On July 15, 1968, while the latter contract was still in effect, Delta entered into a contract with the Board of Education to do post modernization painting and finishing and incidental repairs at P S 228 for the amount of $58,200. On September 9, 1968, after the expiration of the above bargaining agreement, Delta and Respondent entered into a "Memorandum of Independent Contractor Agreement, Effective September 9, 1968," in which they obligated themselves to "live up to and conform with all the provisions, terms and conditions of the prior agreement, except as modified and amended by the new agreement" between Respondent and the Association, in addition, Delta agreed "to execute a more formal instrument as soon as [it] is notified by the Union that the same has been prepared." and that this formal agreement would supercede the memorandum agreement in all respects. [3] Subsequent thereto, either in September or October, Respondent submitted to Delta such a formal bargaining agreement covering the period until July 31, 1971, but Delta declined to sign the agreement because of an unsettled and disputed claim by Respondent against Delta in the amount of about $26,000 for pension and fringe benefits assertedly due under Delta's pre-existing contracts with Respondent.

During August or September 1968, Delta subcontracted to Strip Clean some of the painting work to be done for the Board

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[2] Delta was not a member of the Association.

[3] It was stipulated that this memorandum of agreement is binding on Delta.

of Education at P.S. 228. At about the same time, Strip Clean executed a collective-bargaining agreement with Respondent. However, this latter contract was cancelled by Respondent on September 19, 1968, on the ground that "Strip Clean is the alter ego of Delta and under the rules of [Respondent] this is not permissible." [4] Whereupon, Delta cancelled its subcontract with Strip Clean.

Work was begun by Delta itself at P.S. 228 during the latter part of 1968. Delta started with carpentry work and other repairs; it did no painting work because the over-crowded condition of the school precluded such activity. Painting work did begin thereafter in February or March 1969, but a concentrated effort in this direction occurred in the latter part of June 1969.

The above-mentioned dispute between Respondent and Delta which had affected the consummation of a new agreement in 1968, came to the attention of the Board of Education. In early January 1969, Respondent sent a letter to the Board of Education complaining that "Delta was not paying the prevailing rate and fringe benefits." [5] Thereupon Richard J. Martin, the Director of Maintenance and Operation of the Board of Education, convened

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[4] Although John Durandes, the general manager of Delta, testified to the contrary, it would appear, and I find, that Respondent had, by this time, determined that Delta was an unfair employer.

[5] Article 63 of the above-mentioned contract between the Board of Education and Delta provided, in relevant part, that the wages to be paid for a legal day's work to laborers, workmen or mechanics employed upon work contemplated by this contract "shall not be less than the 'prevailing rate of wage' 'and supplements as required' and defined in Section 220 of Labor Law. . . ." Attached to the invitation from the Board of Education to contractors to bid on the work to be done at P.S. 228 was a

a meeting at his office in early January 1969, to which all interested parties in the dispute were invited. Present in behalf of the Board of Education were Martin; Charles Francescani, chief of the field section, bureau of maintenance; Irving Golden, Esq., a lawyer attached to the Board of Education staff; and a Mr. Houston. Attending at the instance of Respondent were Frank Schonfeld, its secretary-treasurer; Carl Blum, administrative aide to Schonfeld; and Samuel Hirsch, executive secretary of the Joint Industry Board. [6] And attending for

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[5] (Continued) section on wage rates which the office of the Comptroller of the City of New York established, pursuant to Section 220 of the Labor Law of the State of New York, for laborers, workmen and mechanics employed by private contractors under contracts involving public work between any agency of the City of New York and such private contractors. With specific reference to painters, the Comptroller set forth the rate per hour for painters, painters on steel, painters on swing scaffolds, and painters apprentices, and also set forth figures as to the supplement benefits, including fringe benefits and payment into the insurance fund.

Also relevant, in connection with the issues herein, are Article 5 and Article 21 of this contract between the Board of Education and Delta. Thus, in Article 5, the contractor undertook that he "shall not have work performed nor shall he employ labor or means that would in any way cause or result in a suspension, or delay of, or strike upon the work to be performed hereunder of any of the trades working in and about [P.S. 228] or in or about any other buildings of the Board [of Education] or working upon any of the premises of the City of New York." And Article 21 provided, in relevant part, that "the Board [of Education] shall have the right to declare The Contractor in default on the whole or any part of the work . . . if at any time the [Executive Director of the office of School Buildings] is of the opinion and shall so certify to the Board [of Education] that The Contractor is or has been wilfully or in bad faith violating any of the provisions of this contract."

[6] The Joint Industry Board is comprised of seven members from Respondent and seven members from contractors

Delta were John Durandes, its general manager; and a Mr. Feinstein, its lawyer. During the meeting, Respondent's representatives claimed that Delta owed Respondent about $26,000 consisting of unpaid employee fringe benefits and a find levied against Delta. Durandes, in turn, disputed the amount claimed but indicated that if Delta could be shown that it owed the money, it would pay. The upshot of the meeting was an amicable arrangement that representatives of Respondent, and of the Joint Industry Board, and Durandes would meet in an effort to resolve the matter.

After the meeting that day, there was some further discussion among some of those who attended the meeting. The testimony is in conflict as to whether requests were then made of Respondent by Board of Education representatives to be notified in advance of any picketing should that eventuate because of a failure to resolve the dispute. Blum and Hirsch testified that there was such discussion with Martin and Francescani. However, Martin denied that he spoke to anyone from Respondent after the meeting that day and added that there was no such discussion during the meeting; and Francescani could not recall anyone in the group mentioning picketing that day, nor did he recall asking anyone to let the Board of Ecucation know if Respondent was going to picket Delta at any of the

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6/ (Continued) serving the painting industry. Schonfeld and Blum are part of the office force which handles administrative details for the Joint Industry Board. Included among their functions are to collect pensions and welfare and annuity contributions for the Painting Industry insurance funds and to take action with respect to reported violations of a collective-bargaining contract either by Respondent or by a member of the Painting Industry.

schools. I note, too, that Blum acknowledged that he testified before Judge Travia in the injunction proceeding in the Federal District Court arising out of the subsequent picketing, (1) that he probably brought up the subject of picketing; and (2) that he told Francescani that Respondent was contemplating picketing if the difficulties between Respondent and Delta were not resolved; and (3) that "[he] also suggested at that time we write to the Board." I note, also, in the case of Hirsch, that, although he could not recall while testifying herein whether Durandes was involved in the post-meeting discussion concerning the contingency of a picket line, he acknowledged testifying before Judge Travia that Durandes was present and that Francescani talked to Durandes about wanting him to straighten out the matter because if there was any picketing, his contract with the Board of Education might be in jeopardy. In all these circumstances, including their acknowledged testimony before Judge Travia, and as Blum's and Hirsch's testimony herein seemed to be influenced by their strong partisan feelings in the matter, I find that the record does not preponderate in favor of a finding that any representative of the Board of Education at that meeting or immediately thereafter requested either Blum or Hirsch, or both of them, to have Respondent notify the Board of Education in advance of any picketing. However, I find further, in this connection, on the basis of the entire record that (1) representatives of the Board of Education have made it known to unions performing work at any of its locations that the Board of Education was interested in knowing, whenever a labor dispute developed in the course of such work, if there would be any picketing; and (2) it is the practice of the representatives of the Board of Education, upon being

notified that picketing was going to occur at a school, to ask for a letter to that effect from the union involved.

The dispute between Respondent and Delta was not resolved thereafter; it eventuated in picketing by Respondent at P.S. 228, which began on September 4, and continued through October 10, 1969. On the latter date, during the pendency of the above mentioned injunction proceeding before a Federal District Court of the Eastern District of New York, which proceeding was instituted by the General Counsel pursuant to 10(1) of the Act, [7] Respondent agreed to cease the picketing while awaiting a determination by Judge Travia on the 10(1) petition. An injunction against such picketing issued on October 31. The last day of picketing was October 10, 1969.

B. The Critical events and the alleged secondary boycott activity

The critical events span the period beginning in June 1969 and ending on October 10, 1969. [8] During that period Respondent made some visits to the jobsite and sent three letters and a telegram to the Board of Education bearing dates of July 1, July 14, July 29 and August 14. I shall treat with these matters in detail hereinafter.

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[7] As heretofore found, the complaint herein issued on August 15, 1969.

[8] All dates hereinafter are in 1969.

On or about June 30, around 1:00 or 1:30 p.m., Barney Beard, the business representative of Respondent went to the jobsite at P.S. 228 and there observed two painters on an outside scaffold. He spoke to them, and upon learning that they were employees of Delta, told them that he had orders from Respondent saying that Delta was unfair, that Delta owed money to the welfare and pension fund, and further that he was to tell them to stop working. 9/ At this, the men stopped working and

9/ Although Durandes testified that Beard made two visits to the jobsite, one on June 27 and one on June 30, during which Beard spoke to painters on the job, Beard insisted that this happened only once during this period and it could have been "the first [of July], the thirtieth or the thirty first [of June]." I note, too, that Durandes' prehearing affidavit to a Board agent is at odds with his testimony, in that his affidavit speaks of a visit to the P.S. 228 jobsite on or about the first of July of "10 or 12 business agents or District Council Members - I don't know which," and a visit to the same jobsite by "Beard, a business agent of District Council 9" about 2 days thereafter. I am persuaded that had Beard been there on the two occasions, the affidavit would have identified Beard as being among the 10 or 12 business agents, too. In all these circumstances, I find that Beard was there only on one of these two occasions referred to in Durandes' affidavit and that this occurred on or about June 30. And assuming that there was a prior visit by unidentified representatives of Respondent to the jobsite on another occasion in June, I make no findings thereon, as absent any identification of such representatives in the record Respondent is precluded from adequately contesting the testimony adduced by the General Counsel in that regard.

went inside the building to change their clothes. Durandes arrived on the jobsite about this time and spoke to Beard. After learning what Beard had done, Durandes told Beard that he had "no right to stop the men"; and, to Beard's answer that he had orders from Respondent to do so, Durandes replied that "[he is] going to bring in 10 men from a different local." Sometime during this episode, Beard entered the building. During his stay, he went to the custodian's office and, from there, spoke on the telephone with Francescani. 10/ Beard told Francescani, according to the latter's credible testimony, that Delta "had not cleared its problems with the union and that if Delta continued

10/ Although Beard denied that he went into the building that day or that he telephoned or spoke to anyone from the Board of Education while at the jobsite, I am satisfied that he did both, in view of Francescani's credible testimony that, at the end of June, he received a telephone call from P.S. 228 and in the course thereof spoke to a person who identified himself as a business agent for Respondent. In this connection, I infer and find, from the coincidence that Beard was admittedly on the jobsite at the end of June and from Francescani's further credible testimony as to the train of events which followed his conversation with the business agent, that Beard was, in fact, the business agent involved in the telephone conversation.

to work there, [Respondent] would have to picket the school." 11/ At this, Francescani asked Beard to have an officer of Respondent call him and Beard agreed to do so. That afternoon, Francescani received a telephone call from Blum, the administrative aide to Schonfeld, who is Respondent's secretary-treasurer, in which Blum voiced, in effect, what Beard had said, i.e., that "he had tried to solve the problem with Delta and Delta had not cooperated, and that, if Delta continued to work, [Respondent] would picket." Whereupon, Francescani asked Blum to put it in writing. Blum agreed to do so 12/ and, in consequence, by letter dated July 1, Schonfeld wrote to Hugh McLaren of the Office of School Buildings of the Board of Education concerning the matter. When the letter 13/ reached Francescani, he discussed the problem with Martin and Golden, and a decision was reached concerning it. Pursuant thereto,

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11/ Although Durandes testified that he was present during the conversation and apoke to Francescani, too, I note that Francescani did not mention this. In all the circumstances, including the developments of the next few days, as found herein, I find that, contrary to Durandes, he did not then speak to Francescani, nor did he have a follow-up conversation with Francescani that afternoon, as he further testified, in which he agreed to stop work at P.S. 228.

12/ Blum testified that, after hearing from Beard, he telephoned Francescani and told him of Beard's visit to P.S. 228 and of Beard's finding two men there who were working for Delta, that Respondent had been unable to resolve its dispute with Delta, and that in keeping with his promise last January to give advance notice of any action to be taken, he was letting Francescani know that "we contemplated picketing Delta." Also according to Blum, Francescani asked him to write to the Board of Education about Respondent's intention to picket and he, in turn, spoke to Schonfield and Hirsch, the executive secretary of the Joint Industry Board about this.

13/ The letter is in evidence as General Counsel's Exhibit 3 and reads as follows:

Delta was called by him and told to stop working and to try to resolve the problem; in addition, the custodian of P. S. 228 was called by him and told not to allow Delta into the school. 14/ Also according to Francescani, he then noted on the above letters

13/ (Continued) We are resuming our request that the above be declared a non-responsive employer. At a previous hearing, District Council #9 agreed to withhold its request since the staff and personnel at your office, and Mr. Delta, indicated that they thought the difficulties that existed could be rectified. However, this has not been so. In fact, there are liens pending against this corporation by the Painting Industry Insurance Fund and others, stemming from violations of the Trade Agreement.

Furthermore, we are notifying you of our intent to take necessary economic action at any location at which we find this employer working. Specifically, we intend to picket the job site at P.S. #228 in Brooklyn where we are informed that this company might resume work for your organization.

14/ It is apparent that Francescani had not yet heard of Strip Clean when this action was taken by the Board of Education. Thus, Francescani testified that he first heard of Strip Clean from the Board's Regional Office when he was called about a charge filed by Strip Clean in Case No. 2-CD-399; and the record shows that the charge in question was filed on July 14, 1969. However, in view of the testimony of Beard that Durandes told him during the conversation at the jobsite that he was going to bring in 10 men from a different local, and in view of Durandes' testimony, that, at about this time, he subcontracted to Strip Clean the work remaining to be done by Delta at P. S. 228; and that Strip Clean's employees who were represented under a collective agreement between Strip Clean and Local 7, were already on the job, I infer, and find, that Strip Clean and its employees had been installed on the job before the orders to stop work were issued.

of July 1, "for the file," the following: "Contractor not working until a settlement is reached. Custodian notified. [signed] C. F. 7/3/69."

On July 14, Respondent followed up its letter of July 1, above, by a telegram from Schonfeld to McLaren, which read as follows:

> Re Delta Contracting Corporation As Per Letter July 1, 1969 Delta Contraction Corp in Violation Of Union Contract Under Payment To Pension And Insurance Funds Amounting To $22, 516. 98 Job Will Be Picketed Request Immediate Resumption Of Board of Responsibility Hearing And Cancellation Of Board Of Education Contract Under Article 5.

On July 17, a meeting was convened at the instance of officials of the Board of Education to discuss complaints from Respondent about Delta. Present for the Board of Education were Martin and several others. Present for Delta were Durandes and its attorney, Feinstein. Durandes also brought to the meeting a Mr. Kerr, who claimed to be a delegate from Local 7. Respondent was not invited to the meeting and was not represented. Durandes there made known that he was no longer doing the work under his contract with the Board of Education but had subcontracted to Strip Clean. This, in turn, caused Martin to raise the question of whether the fact that Strip Clean was dealing with a union other than Respondent created a jurisdicational dispute. At this juncture of the meeting, or on the following day, according to Martin, he received a telephone call from Blum, in which Blum said that "he had given up on being able to resolve matters with Delta and that they were going to be forced to picket." Martin then explained to

Blum what he had learned at the meeting about Strip Clean. Blum's response was that he knew about this, that Strip Clean was an "alter ego" of Delta since Strip Clean was owned by the brother-in-law of Durandes and that the fact that Strip Clean was the subcontractee did not alter the situation Martin then indicated that the labor dispute was now "a jurisdictional dispute and that they should take it up through proper legal channels instead of trying to get [the Board of Education] to resolve this," and that "[he] didn't think [the Board of Education] could resolve it." The conversation ended with Blum saying that "they were going ahead with the picketing." There is testimony in the record by Blum that he spoke to Martin on the telephone about the fact that Respondent contemplated picketing at P. S. 228. However, he placed the time of the conversation "around early September," after he had sent Beard to P. S. 228 to check on the job in early September and Beard had reported back to him what he had found. In his version of the conversation with Martin, he told Martin what Beard had reported, and Martin said that Strip Clean was working there and the employees on the job were affiliated with Local 7. His reply to Martin was that Strip Clean was not signed with Respondent, that he did not know who Local 7 was and that "we were getting ready to picket Delta Contracting." I note, in this connection, that Blum insisted, during cross examination, that he had no knowledge of Strip Clean doing any painting for Delta at P.S. 228 or any other school until Beard reported to him in early September concerning the P. S. 228 job. Yet, he acknowledged that "he [had] had dealings with Strip Clean" before the above telephone conversation; that he had discussed with Schonfeld "the body" of the correspondence consisting of three letters and a telegram, sent by Respondent to the Board of Education during July and

August; and that Respondent's July 29 letter to the Board of Education says, in part; "With regard to subcontractors allegedly taking over the work from Delta, may I call your attention to the fact that under the terms of the Trade Agreement signed by Delta Contracting Corp., Delta assumes responsibility that the work will be done by the sub-contractor in accordance with the Trade Agreement. Further we have previously established Strip Clean Painting is an alter ego for Delta Contracting Corporation." In light of the above, I find that the inherent probabilities of the situation are that Blum was cognizant of the subcontracting by Delta to Strip Clean at the time when, according to Martin, Blum telephoned him. In all these circumstances, including the fact that Martin impressed me as a forthright witness and as more reliable than Blum, I credit Martin and find that Blum did telephone Martin on July 17 or July 18 and that the content of the conversation was as testified to by Martin.

As already noted, a subsequent development during July was the letter of July 29 from Respondent to the Board of Education. The burden of the letter was that the Board of Education call a meeting of the Board of Review for the purpose of cancelling the contracts of the Board of Education with Delta. The entire text of the letter was as follows:

> In further clarification of our telegram of July 14, 1969, requesting "immediate resumption of Board of Responsibility hearing and cancellation of Board of Education contract, under Article V", pleased be advised that the money due to the Pension and Insurance Funds, $22,516.98, is separate and apart from the list of names and amounts previously given to Mr. Durandes, of Delta Contracting Corp., in connection with the hearing in your office held on Thursday, January 2, 1969, at 10:00 A.M.

Included in the above figure of $22,516.98 is an item of $380.00, a check dated November 15, 1968; (prior to the meeting in your office on January 2, 1969), which was a payment to the Painting Industry Annuity Fund. This check had been returned by the bank for insufficient funds and is still outstanding.

Subsequent to that meeting, we have made every effort to bring Delta Contracting Corp. into good standing with the union to avoid any drastic action. Unfortunately, we have not been successful and we must insist that there is more than adequate ground for the Board of Review to resume its hearing with a view to cancellation of the contracts of Delta Contracting Corp.

With regard to sub-contractors allegedly taking over the work from Delta Contracting Corp., may I call your attention to the fact that under the terms of the Trade Agreement signed by Delta Contracting Corp., Delta assumes responsibility that the work will be done by the sub-contractor in accordance with the Trade Agreement. Further, we have previously established that Strip Clean Painting is an "alter ego" for Delta Contracting Corp.

The charges we have made are serious. Because we are mindful of serving the best interests of the schools as public spirited citizens, we must insist that such gross and repeated violations, involving large sums of money, should not be ignored. We want to avoid any scandals involving execution of painting contracts, both from the point of view of our Union, as well as the Board of Education and the City of New York.

We trust that you will set a date for a meeting of the Board of Review, to go into this matter, at your earliest convenience.

On August 13, 1969, the Board of Education conducted a meeting of its Board of Reiew to consider the matter of declaring Delta in default on Delta's contracts with it covering various schools in various New York boroughs, including the one covering P.S 228. Prior thereto, it had received a recommendation from Martin, its Director, Division of Maintenance and Operation, that Delta be declared in default on these contracts in accordance with the provisions of Article 21 Also operative factors in the calling of this meeting were the above-described written communications to it from Respondent of July 1, July 14 and July 29 and the telephone calls from Respondent to Francescani on or about June 30 and the telephone call from Respondent to Martin on July 17 or 18 So far as appears, among those present at the Board of Review meeting were McLaren and Francescani for the Board of Education, Hirsch for the Joint Industry Board, and Durandes and Feinstein for Delta After considerable discussion, the meeting ended without the Board making any finding of default by Delta

One of the two developments in the wake of the August 13 meeting was a letter dated August 15, from Martin to Delta, directing Delta to resume work wherever Delta had theretofore suspended work and authorizing Delta to use Strip Clean as a subcontractor "pending an audit of [Strip Clean's] books and records to determine if it is paying the prevailing rate of wages and benefits as represented in a letter of recent date from Strip Clean Floor Refinishing and Painting Corporation, addressed to the Board of Education." The letter then continued with the following admonition:

This Division has been advised by the Brotherhood of Painters, Decorators and Paperhangers of America, District Council No. 9 of New York City that if either you or Strip Clean Floor Refinishing and Painting Corporation perform any work in our schools, that picket lines will be placed around the premises and thereby cause a suspension or delay of or strike of any trades working in or about the premises in question.

Your attention is directed to Article 5 of your contract which reads as follows:

> "The Contractor shall not have work performed, nor shall he employ labor or means, in the carrying out of this contract that would in any way cause or result in a suspension, or delay of, or strike upon the work to be performed hereunder of any of the trades working in or about the premises herein described, or in or about any other building of The Board or working upon any of the premises of The City of New York."

In the event such suspensions, delays or strikes develop at the premises, this Division will recommend that the Board of Education avail itself of the appropriate remedies which are consistent with the terms of your contracts.

The other development in the wake of the August 13 Board of Review meeting was a letter dated August 14 from Schonfeld to McLaren. The pertinent portions of the letter are as follows:

> Please be advised that until such time as Delta Contracting Corp. arranges to pay its obligations for its employees' pension, welfare, insurance and annuity benefits, District

Council 9 will picket any jobs which it should work on or which any of its sub-contractors should be engaged in on Delta's behalf. This includes Strip-Clean Floor Refinishing and Painting Co., and any other such sub-contractor. I am notifying you of this because the Board of Education has a number of outstanding, uncompleted contracts with Delta

As long as Delta Contracting is under obligation to pay past-due fringe benefits, we would regard its employmeat of a sub-contractor as a subterfuge to evade Delta's obligations under its contract with District Council 9. Therefore, whether Delta Contracting Corp. does the work, or whether the work is done by a sub-contractor, the terms of the Trade Agreement, as above, still apply.

Furthermore, with regard to Strip-Clean Refinishing and Painting Corp., they signed a contract with us on September 11, 1968. However, we revoked this contract, effective September 19, 1968, when we determined that the employment by Delta of this company was a device by Delta to continue working while in violation of its contract with District Council 9. The device was the more obvious, incidentally, by reason of the fact that Ada Gloro (Mrs. John Durandes), the president of Delta, is the sister of Mr. Felix Jose Gloro, the principal of Strip-Clean. In this connection we cite the following Article VII, Section 1(n) from our contract:

> "The Union shall not enter into a contract with an employer who is indebted under the terms of this Agreement or any prior Agreement by reason of his non-payment of wages, wage benefits, annuities, penalties or liquidated damages as assessed

by the Joint Industry Board, whether such employer proposes the making of such contract under his own name or under the name of any firm or corporation in which he is a principal or has a substantial interest."

For the above reasons, apart from the question of any Union affiliation or lack of affiliation, it is clear that, on the basis of our contract with Delta, District Council 9 has more than ample legal ground to picket Delta or any sub-contractor engaged in doing Delta's work. Accordingly, if Delta should resume work, we will ask the public and our men to give us every possible legal support to assist us in maintaining the wages and benefits of our members.

On August 18, Strip Clean was at work at P.S. 228, performing painting work under its subcontract with Delta. It continued such work during the rest of August and most of September. On September 2, Beard paid a visit to the P.S. 228 jobsite where he made an on-the-spot observation that Strip Clean was doing the painting work and was employing painters, who were adherents of Local 7. Beard relayed this information to Blum via telephone [15] from the school building and, in consequence, he was given instructions to commence the picketing. On September 4, as stipulated by the parties, picketing began at P.S. 228; the picket signs carried the following legend:

15/ I have heretofore found, contrary to Beard's testimony, that he did not speak to Francescani from a telephone inside the school building on this occasion, but did so on the occasion of his prior visit to this jobsite on or about June 30.

DELTA CONTRACTING UNFAIR
TO
DC 9, AFL-CIO
227 WEST 17TH STREET, NEW YORK CITY
FOR
UNDERPAYMENT
TO INSURANCE AND
PENSION FUNDS

The picketing continued until October 10. Notwithstanding the picketing, Strip Clean continued to work at P S 228 until September 26. At that time, Strip Clean, on its own, ceased work temporarily, leaving a large scaffold and other equipment on the premises. Thereafter, shortly before December 1, Strip Clean returned to P.S. 228 in order to complete the work under its subcontract.

As heretofore found, Respondent agreed to cease the picketing on October 10, while awaiting a determination by Judge Travia in the pending 19(1) injunction proceeding instituted by the General Counsel, and an injunction issued thereafter on October 31.

C. Analysis and Conclusions

It is apparent from all the foregoing that the labor dispute herein was between Respondent and Delta and arose over Delta's non-payment into Respondent's pension and fringe benefit funds of certain claimed deficiencies; and that, although the Board of Education had no labor dispute with Respondent, it became enmeshed in the dispute between Respondent and Delta. [16]

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[16] Although the Board of Education is not an employer within the Act's meaning, it is a person engaged in commerce within the definition of Section 8(b)(4) of the Act and is entitled to the full protection of the Act. See Plumbers,

In the latter connection, I have heretofore found that there were three oral communications from Respondent to the Board of Education to the following effect: (1) on or about June 30, Beard, Respondent's business agent, telephoned Francescani, the chief of the field section in the Bureau of Maintenance of the Board of Education and said, in relevant part, that "[Delta] had not cleared its problems with the union and that if Delta continued to work there [Respondent] would have to picket the school"; (2) later that same day, Blum, the administrative aide to Respondent's secretary-treasurer, telephoned Francescani and said, inter alia, that "he had tried to solve the problem with Delta and Delta had not cooperated and that, if Delta continued to work, [Respondent] would picket"; and (3) on either July 17 or 18, Blum telephoned Martin, the director of maintenance and operation of the Board of Education, and said, in relevant part, that "he had given up being able to resolve matters with Delta and that they were going to be forced to picket." As also found herein, there were, in addition, some written communications from Respondent to the Board of Education, namely, three letters dated July 1, July 29, and August 14, respectively, and one telegram dated July 14. An examination of these documents establishes, I find, the following: (1) Respondent's July 1 letter requested that the Board of Education declare Delta a non-responsible employer, [17] and also notified the Board of

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16/ (Continued) Steamfitters, Refrigeration, Petroleum Fitters & Apprentices of Local 298, AF of L., et al v. County of Door, a Municipal Corporation, et al., 359 U.S. 354.

17/ Such a determination would, according to the terms of the contract between the Board of Education and Delta, result in a cancellation of the contract.

Education of "[Respondent's] intent to take necessary economic action at any location at which we find this employer working. Specifically we intend to picket the jobsite at P.S. 228 in Brooklyn where we are informed that this company might resume work for your organization"; (2) Respondent's telegram of July 14 stated that Delta was in violation of its contract with Respondent and that the "job will be picketed," and requested, at the same time, "immediate resumption of Board of Responsibility hearing and cancellation of Board of Education contract [with Delta] under Article V"; (3) Respondent's July 29 letter was in further clarification of the above telegram and said "unfortunately we have not been successful [in resolving our dispute with Delta] and we must insist that there is more than adequate ground for the Board of Review to resume its hearing with a view to cancellation of the contracts of Delta Contracting Corp"; it also stressed the seriousness of its charges and said, in that connection, "we want to avoid any scandals involving execution of painting contracts, both from the point of view of the Union as well as the Board of Education and the City of New York"; and (4) Respondent's letter of August 14 advised the Board of Education that "until Delta pays its obligations under its contract with Respondent in respect to employees' pension, welfare, insurance and annuity benefits, [Respondent] will picket any jobs which [Delta] should work on or which any of its subcontractors [including Strip Clean] should be engaged in on Delta's behalf." [18] Finally, I have also found that these oral and written communications culminated in picketing by Respondent on September 4 to October 10 at P.S. 228, with picket signs

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[18] I note that this written communication did not, in haec verba, seek a cancellation by the Board of Education of its contracts with Delta.

which referred to Delta as unfair to Respondent because of underpayment to insurance and pension funds.

The law is clear that Respondent may, under the proviso to Section 8(b)(4)(B), lawfully engage in "a primary strike or primary picketing" against Delta and or Strip Clean, [19] but it may not, for proscribed objectives, threaten, restrain or coerce the Board of Education, a neutral to the labor dispute, or induce or encourage the employees of the Board of Education to engage in a strike or refusal to perform services. However, Respondent contends, in effect, in its brief, that the essential elements of a violation of Section 8(b)(4)(B) of the Act have not been established. Thus, it asserts that the oral or written communications which were directed to the Board of Education did not constitute acts of coercion or restraint because these communications (1) were in response to the request of the Board of Education that Respondent keep it advised regarding Respondent's intention to picket; (2) were, insofar as they were in writing, in accord with the practice of the Board of Education of requiring complaints to be in writing before it would take action; and (3) constituted legitimate demands, in its role as a member of the public, that the Board of Education, a governmental organization, enforce the terms of its contract with Delta. And it urges further that its picketing was not directed against the Board of Education and, even if so directed, such picketing was in the nature of a primary dispute with the Board of Education, in that, as a member of the public, it was pursuing the legitimate objective of getting the Board of Education, a governmental

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19 The General Counsel conceded that Strip Clean was the ally and/or was doing the struck work of Delta. As such, I find, Strip Clean stands in the same position as Delta vis a vis Respondent in the instant labor dispute

agency, to enforce a contract that the Board of Education had with Delta, with respect to Delta's violation of New York state law.

I am unpersuaded by Respondent's contentions. The oral and written communications to the Board of Education are to be considered together. As such, they constitute pressure upon the Board of Education to take the necessary steps leading to the cancellation of its contract with Delta. The consequence of cancellation would, of course, be the cessation by the Board of Education of doing business with Delta. This pressure to cancel was coupled by Respondent with expressions of intention to picket so long as Delta continued working for the Board of Education at P.S. 228 and other jobsites. Although Respondent seeks to import a doctrine akin to waiver into the situation by claiming that its communications were not coercive because they were in response to the request of the Board of Education at the January meeting to be kept advised regarding Respondent's intention to picket, such argument is unavailing to Respondent because I have found that the record does not support its factual premise that there was such a request. However, even assuming such a request, the Board of Education would have indicated thereby no more than that it would be better able to cope with an objectionable situation involving picketing of school premises, if it was alerted to such situation before the inception of the picketing. It would be straining to the breaking point to hold that the Board of Education would thereby be implying a waiver of its right to protection under 8(b)(4) of the Act. [20/] And insofar as the Board of Education has a practice, upon being notified that picketing was to occur at a school, to ask for a written

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20/ Such a waiver would, in any event, be against public policy.

communication to that effect from the union involved, and granting that such practice was invoked here, it constituted no more than an effort on the part of the Board of Education to have the notification of the impending objectionable situation formalized in the interest of being able to cope with it better administratively. Further, while it cannot be denied that, in its role as a member of the public, Respondent was within its rights in demanding that the Board of Education, as a governmental organization, enforce the terms of its contract with Delta, it is, of course, also true that Respondent was, at all relevant times, directly involved in the matter which gave rise to its demands upon the Board of Education Indeed, in its letter of July 29 to the Board of Education, the only communication in which it made mention of its role as a public citizen in making its demand upon the Board of Education to cancel its contract with Delta, Respondent indicated that its demand was prompted also by its direct involvement in a labor dispute with Delta. Thus, the letter said, in relevant part, "we want to avoid any scandals involving execution of painting contracts, both from the point of view of our Union, as well as the Board of Education and the City of New York." (underscoring supplied). In all these circumstances, I conclude, and find, that Respondent made clear to the Board of Education through these written and oral communications that it intended to picket and that an object of such picketing would be to get the Board of Education to cease doing business with Delta because of Respondent's labor dispute with Delta over the claimed violation by the latter of its union contract. [21]

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[21] In this connection, the July 14 telegram, which the July 29 letter was meant to clarify further, read, in relevant

With respect to Respondent's contentions addressed to the picketing itself, it is true that the picket signs made no mention of the Board of Education and mentioned only Respondent's labor dispute with Delta, and further that the General Counsel concedes, in its brief, that there has been substantial literal compliance with Moore Dry Dock standards [22] in the picketing that took place at P.S. 228. However, these standards are not to be applied on an indiscriminate per se basis but are to be regarded merely as aids in determining the underlying statutory violation. [23] Here, the picketing does not stand in isolation. It was preceded by the aforementioned communications which sought to involve, and did involve, the Board of Education in Respondent's labor dispute with Delta, and, during these communications, Respondent foretold its intention to picket the school, without restriction or limitation, in the event of the failure to resolve the labor dispute, and clearly indicated the objective, because of such failure, of having the Board of Education cancel its contract with Delta and cease doing business

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21/ (Continued) part, "As Per Letter July 1, 1969 Delta . . . In Violation Of Union Contract Underpayment To Pension And Insurance Funds Amounting To $22,516.98 Job Will Be Picketed . . . ."

22/ The standards set forth in Moore Dry Dock Co., 92 NLRB 547, are, in substance, that the picketing disclosed that the dispute was with the primary employer, that the picketing occurred when the situs of the dispute was located on the premises of the neutral or secondary employer, that the picketing was limited to the situs of the dispute, and that the primary employer was then engaged in its normal business at that situs.

23/ See International Brotherhood of Electrical Workers, Local Union 861 and Arnein Lard, its agent, and Plauche Electric Inc., 135 NLRB 250, 255; International Brotherhood of Electrical Workers, Local Union No. 11, AFL-CIO, et al. and L.G. Electric Contractors Inc., et al. 154 NLRB 766.

with Delta. It follows therefore that there is no legal substance to Respondent's contention that its picketing was not directed at the Board of Education. Nor can Respondent take legal refuge in its alternative position that, even if its picketing was directed at the Board of Education, such picketing was in the nature of a primary dispute with Board of Education in that, as a member of the public, it was pursuing the legitimate objective of getting the Board of Education, a governmental agency, to enforce a contract that the Board of Education had with Delta, with respect to Delta's violation of New York state law. Thus, assuming without deciding, that picketing for such a purpose is, in the circumstances, primary picketing, [24] I cannot find, on this record, that this was the only purpose of the picketing. Thus, the picket signs made no mention that the picketing was for the purpose of eliciting a public response to an alleged failure of the Board of Education to enforce a contract it had with Delta, with respect to Delta's violation of New York state law. Indeed,

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[24] N. L. R. B. v. Building Service Employees 396 F. 2d 131 (C. A. 1), cited by Respondent, is not dispositive of the issue. The cited case involved a petition to hold a union in contempt of the Court's decree enforcing the Board's cease and desist order grounded on 8(b)(4)(B) violations. One of the matters alleged in support of contempt was the picketing by the union of the Massachusetts Board of Education at the building housing the Department of Education, in an attempt to prevent the Department from awarding a building-cleaning contract to a non-union cleaner. Although the Court refused to hold the union in contempt for such picketing, it did so because, in its view, the picketing of a state agency which has no customers raised questions substantially different from the union's picketing of private employers which gave rise to the Board order, and this called for initial statutory interpretation by the Board. And the Court held further that "this action is intended to be without prejudice to any further Board action to determine whether the Department activity violated Section 8(b)(4)."

the only reference thereon was to Respondent's labor dispute with Delta. And I have heretofore found that, in the one instance during Respondent's communications to the Board of Education in which it made mention of its role as a public citizen in making its demand upon the Board of Education to cancel its contract with Delta, Respondent indicated that its demand was also prompted by its own direct involvement in a labor dispute with Delta. Accordingly, as the picketing had as an objective the cessation by the Board of Education to do business with Delta because of Respondent's labor dispute with Delta over its claimed violation by the latter of its union contract, which is a prohibited objective under the Act, the picketing herein runs afoul of the Act.

It follows from all the foregoing, and I conclude, and find, that by its written and oral communications revealing its intention to picket, and by its picketing at P.S. 228, Respondent threatened, coerced and restrained the Board of Education, where an object thereof was to force or require it to cease doing business with Delta and/or Strip Clean, in violation of Section 8(b)(4)(ii)(B) of the Act. [25] However, I find differently with respect to the allegations of the complaint, as amended, that Respondent violated 8(b)(4)(i)(B) by the picketing herein. The record fails to demonstrate that any of the employees of the

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[25] See Local 2669, affiliated with Suffolk County District Council of Carpenters, United Brotherhood of Carpenters Joiners of America, AFL-CIO, (T. & D. Roofing Co., Inc.), 173 NLRB No. 166; International Brotherhood of Electrical Workers, Local Union No. 11 AFL-CIO, et al. (L. G. Electric Contractors, Inc., et al.) supra; Building Service Employees International Union, Local No. 105 (Industrial Janitorial Service, Inc., et al.), 151 NLRB 1424.

Board of Education were induced or encouraged by Respondent to engage in a work stoppage. 26/ And I cannot find, in view of the concession of the General Counsel that the picket signs and the picketing conformed to the standards of Moore Dry Dock, that the necessary effect of the picketing was to induce or encourage any employees of the Board of Education at P.S. 228, who may have been exposed thereto, to engage in such stoppage in violation of the Act. Accordingly, I find that the allegations of the complaint, as amended, that Respondent violated Section 8(b)(4)(i)(B) have not been sustained. 27/

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Board of Education is a person engaged in an industry affecting commerce within the meaning of the Act.

2. Respondent is a labor organization within the meaning of the Act.

3. By threatening, restraining or coercing a person in an industry affecting commerce with an object of forcing him to cease doing business with another person, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(ii)(B).

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

26/ I note that the record also fails to disclose the nature and extent of the employee complement of the Board of Education at P.S. 228 at the time of the picketing herein. All that does appear is that employees of Strip Clean were on the jobsite during the picketing until they stopped work on September 26 at the instance of Strip Clean because Strip Clean was short of funds.

27/ See Building Service Employees International Union, Local No. 105 (Industrial Janitorial Service, Inc., et al.), supra.

5. Respondent has not induced or encouraged employees to engage in a work stoppage in violation of 8(b)(4)(i)(B) of the Act.

The Remedy

Having found that Respondent has violated Section 8(b)(4)(ii)(B) of the Act, I will recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, I recommend, in order to effectuate the policies of the Act, that Respondent, New York District Council No. 9 Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, its officers, agents, successors and assigns shall:

1. Cease and desist from

(a) Threatening, coercing or restraining the Board of Education of the City of New York, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require the Board of Education of the City of New York, or any other person, to cease doing business with Delta Contracting Corporation and/or Strip Clean Floor Refinishing & Painting Corp.

2. Take the following affirmative action:

(a) Post in conspicuous places at its offices and meeting halls, copies of the notice, marked "Appendix A." 28/

28/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor

Copies of said notice, on forms provided by the Regional Director for Region 29, shall, after being signed by a representative of Respondent, be posted by Respondent immediately upon receipt thereof and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the said Regional Director for posting by the Board of Education of the City of New York, Delta Contracting Corporation, and Strip Clean Floor Refinishing & Painting Corp., if they are willing, at locations where notices to their employees are customarily posted.

(c) Notify the said Regional Director, in writing, within 20 days from the date of receipt of this Trial Examiner's Decision what steps Respondent has taken to comply herewith. [29]

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[28] (Continued) Relations Board, the findings, conclusions, recommendations and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading, "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[29] In the event these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

It is further Ordered that the complaint, as amended, be, and it hereby is, dismissed insofar as it alleges violations not found herein.

Dated at Washington, D. C.

/s/ Harry H. Kuskin
TRIAL EXAMINER